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No. 1183

In the Supreme Court of the United States

OCTOBER TERM, 1967

BENJAMIN MESSINA AND JACK ALWADISH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–4a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 2, 1968. A petition for rehearing was denied on January 31, 1968. The petition for a writ of certiorari was filed on March 1, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the indictment should have been dismissed on the ground that it was based in part on hearsay evidence.

STATEMENT

Petitioners were indicted in the District of Connecticut on charges of transporting eleven stolen motor vehicles in interstate commerce and of selling those vehicles. Petitioner Messina was convicted on 22 counts and petitioner Alwadish on 20 counts. Each was sentenced to imprisonment for a total of nine years.

The evidence showed that in late 1964 eleven automobiles were stolen from their owners in New York and New Jersey (*e.g.* Tr. 55, 99–103, 123–126). Their serial numbers were changed (*e.g.* Tr. 523–527, 394, 600–601), and new automobile registrations were obtained under different names (*e.g.* Tr. 573, 577–578, 793–794). Within a short time after the thefts, petitioners brought the automobiles to Alfred Farrah, a used car dealer in Connecticut, who either purchased them or arranged for their sale to others (*e.g.* Tr. 192–196, 226–230, 248–250, 389–397).

Farrah's trial testimony that petitioners brought him these automobiles (*e.g.* Tr. 178–182, 202–204) was corroborated by various witnesses. Karl Heim related that he had arranged the initial meeting between Farrah and Messina (Tr. 141–150). Ferdinand Danise, one of Farrah's employees, testified that he himself had purchased one of the automobiles from petitioners at the used car lot (Tr. 389–392) and that he had delivered an envelope to petitioner Alwadish at the Yonkers Raceway in December 1964 (Tr. 397–399). Danise and John Meslin, another employee, testified that they had seen petitioners at the used

car lot on other occasions (Tr. 399, 438–439). Meslin also said that he had received an automobile from petitioners at the Yonkers Raceway in December 1964 (Tr. 433–438). A used car dealer, who had purchased two of the cars from Farrah, also had observed Alwadish at the lot (Tr. 543–549). Both petitioners told F.B.I. agent Harrington, in separate interviews, that they did not know Farrah and had never been to his used car lot (Tr. 763–766).

Farrah had been indicted and had pleaded guilty to receiving a stolen motor vehicle (Tr. 174–175). During cross-examination it was elicited that Farrah and Meslin had not testified before the grand jury (Tr. 294–295, 442), but that Danise and F.B.I. agent Smith, who had interviewed Farrah, had appeared as grand jury witnesses (Tr. 400, 625–628).

ARGUMENT

There is no occasion in this case to reconsider the Court's ruling in *Costello* v. *United States,* 350 U.S. 359, that an indictment returned by a properly constituted grand jury is not subject to attack on the ground that it rests on hearsay evidence.[1] This case was presented to the grand jury before the decision of the Second Circuit in *United States* v. *Umans,* 368 F. 2d 725, 730, certiorari dismissed as improvidently granted, 389 U.S. 80. In that case, the court of appeals, while declining to dismiss the indictment, indicated that excessive use of hearsay would tend to undermine the function of the grand jury and sug-

[1] This same issue is raised in *Malofsky* v. *United States,* No. 1289 Misc., this Term.

gested that hearsay evidence be used only when direct testimony was unavailable or when it was demonstrably inconvenient to summon witnesses with personal knowledge. We are informed by the United States Attorney for Connecticut that, in light of that decision, he has instructed his assistants to submit to the grand jury the first-hand testimony of actual witnesses except where the witnesses are unavailable or cannot be summoned without causing them extreme inconvenience.

In this case there was no motion in the district court to dismiss the indictment. Moreover, at least one witness, Danise, who purchased a car from petitioner, did testify before the grand jury. Petitioner's claim that the grand jury might have been unaware that it was getting hearsay from F.B.I. agent Smith, is far-fetched; the jury undoubtedly knew that he was not present during the eleven transactions with Farrah.

Nor could the failure to call Farrah, the principal government witness, have been motivated by any desire to deprive the defendant of impeaching material for use in cross-examination since grand jury minutes were not then customarily recorded in Connecticut (a practice since changed). Moreover, petitioners' efforts to impeach Farrah's credibility were not significantly impaired by the lack of a grand jury transcript since petitioners were furnished statements made by Farrah both before and after his decision to cooperate with the government (Tr. 304–310, 315, 334–335).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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